

## Sexual Assault Legal Updates Presentation

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### DEVELOPMENT OF THE SUBSTANTIVE LAW: CONSENT

#### ***R. v. K.(S.) (16 November 2006) (Ont. C.A.)***

The trial judge acquitted the accused. He found that, apart from two considerations, the evidence of non-consensual sex was overwhelming - the first consideration being the complainant's muted response in opposition - the second consideration being the fact that the complainant accompanied the respondent behind the building where the assault took place.

The Crown appealed the acquittal. On appeal the accused's lawyer conceded that the complainants muted response in opposition did not tend to show consent, and was unable to raise a reasonable doubt. Crown arguing that accompanying the respondent behind the building was equally unprobative of consent. Court of Appeal agreeing that the trial judge erred in law with respect to the first consideration - however, finding that the second consideration is one which could, depending on the circumstances, tend to show consent - Court of Appeal allowing appeal - given the clear and admitted error of law concerning the first consideration used by the trial judge, there must be a new trial

#### ***R. v. Stender, [2005] 1 S.C.R. 914***

Consent – Meaning of consent – “voluntary agreement” – s. 273.1(1) – “consent” obtained by extortion not amounting to consent at all – appellant threatening to disseminate nude photographs of complainant unless she had sex with him – complainant having sex with respondent as a result – trial judge acquitting appellant of sexual assault – Ontario Court of Appeal allowing Crown appeal and substituting conviction (see (2004), 188 C.C.C.(3d) 514) – further appeal to Supreme Court of Canada dismissed – Supreme Court agreeing with conclusion of Court of Appeal that complainant did not consent within the meaning of s. 273.1(1) - respondent's conduct amounting to extortion under s. 346(1) – in circumstances, complainant did not voluntarily agree to sexual activity with respondent

#### ***R. v. Crampton, [2004] O.J. No. 3161 (C.A.)***

Consent – trial judge instructing jury that there could be no consent if it were gained by abusing a position of trust, power or authority but then instructing jury that “[a]part from the difference in their ages, I do not think that is a factor in this case” – Court of Appeal finding that instruction may have left jury “with the erroneous impression, that even if the complainant consented to sexual activity, her consent may have been

invalidated because of the difference in age between the appellant and the [complainant]" – while error not likely to have affected verdict, Court unable "to exclude that possibility completely"

**R. v. H.(A.), [2000] O.J. No. 3258 (C.A.)**

Consent - Vitiating of consent by abusing position of power - s. 273.1(2)(c) - relationship between drug dealer and addicted client - Crown raising theory of liability based on vitiated consent only after appellant testifying - appellant charged with sexual assault and forcible confinement - complainant testifying that appellant having forced sexual intercourse with her after they smoked some marijuana in his car - appellant testifying that complainant willingly performing oral sex on him in exchange for cocaine - following appellant's testimony, Crown raising, for the first time, theory of liability based on vitiated consent - Crown arguing that consent vitiated because appellant, as complainant's drug supplier, in position of power or authority over her - trial judge charging jury on issue of vitiated consent - Court of Appeal allowing conviction appeal and ordering new trial - Court finding that trial judge should not have instructed jury on issue in the first place and that instructions that were given were "inadequate to the point of being no instruction at all" - trial judge essentially reading section 273.1(2)(c) to jury and nothing more - Court concluding that section could apply to relationship between drug dealer and addicted client - however, in this case, "where the complainant herself was not suggesting that she had succumbed to the assault because she had become drug dependent, the section should not have been left with the jury at all" - Court also noting that the Crown "cannot attempt to discredit the defence by having a totally different theory of culpability thrown into the mix at the last moment" - Court unable to say with certainty that impugned instructions irrelevant to jury's considerations or that the verdict was a safe one.

**R. v. Matheson, [1999] O.J. No. 1320 (C.A.)**

Consent - Vitiating by 'exercise of authority' - appellant a psychologist convicted to sexually assaulting two of his patients - both complainants 'consenting' but trial judge concluding consent vitiated - Court of Appeal upholding decision and dismissing conviction appeal - 'exercise of authority' not requiring appellant to enforce obedience from complainants - appellant clearly in a position to influence conduct of complainants and his conduct resulting in consent being vitiated by exercise of authority

**R. v. Quashie, [2005] O.J. No. 2694 (C.A.)**

Consent – Sexual assault causing bodily harm – Court of Appeal finding that trial judge erring in not instructing jury that, on the included offence of sexual assault causing bodily harm, in order for bodily harm to vitiate consent jury had to find both that appellant intended to inflict bodily harm on the complainant and that appellant had, in fact, caused her bodily harm.

**R. v. Robinson, [2001] O.J. No. 1072 (C.A.)**

Defence of consent - availability where bodily harm caused - Court of Appeal concluding that trial judge properly instructing jury that defence not available if bodily harm caused although "it would have been preferable had the trial judge made it clear that consent was no defence only if the appellant deliberately inflicted pain upon the complainant causing bodily harm ..."

**R. v. H.(D.W.), [2006] O.J. No. 1009 (C.A.)**

Consent – Mistaken belief in consent. The accused was convicted of sexual assault arising from allegation he inserted a dildo into his wife's vagina without consent while she was heavily medicated with sleep agents. On appeal from conviction, it was conceded that the sexual activity took place. The crucial issue before the Court of Appeal was whether the trial judge erred in finding that the appellant did not take reasonable steps to ascertain whether the complainant was consenting. Appellant further arguing that the trial judge erred in law by failing to marshal and review the evidence relevant to whether the appellant had taken reasonable steps – appellant submitting that the prior relationship and the nature of prior sexual activity provided a basis for reasonable belief in consent. The Court of Appeal found that evidence of the appellant's belief in consent based on prior sexual activity was of little assistance. Circumstances had changed significantly as of the date of the assault – complainant had undergone serious surgery and was in considerable pain – appeal dismissed.

**R. v. Pittman, [2005] O.J. No. 2672 (C.A.)**

Consent – mistaken belief. – air of reality -defence in error in submitting that lack of resistance must be equated with consent and in suggesting that complainant was required to forcefully make absence of consent obvious – appellant also unable to raise honest mistaken belief as there was no evidence that he took any reasonable steps to determine whether complainant was consenting.

**R. v. Lam, [2004] O.J. No. 357 (C.A.)**

Consent – Honest mistaken belief – Court of Appeal rejecting submission that trial judge failing to consider whether Crown had proved absence of consent and whether appellant knew that victim did not consent – consent and mistaken belief in consent not raised at trial and there was no air of reality to those issues – complainant was intoxicated and said "no" repeatedly – appellant did not testify and did not allege consent – appeal from conviction for sexual assault dismissed

**R. v. Cornejo, [2003] O.J. No. 4517 (C.A.)**

Defences available to accused – Honest mistaken belief – Sexual assault – Air of reality – Reasonable steps – Crown appeal – Court of Appeal concluding that trial judge erring in leaving defence of honest mistaken belief with jury – no air of reality in circumstances of this case – respondent also failing to take reasonable steps to ascertain if complainant consenting – appeal from acquittal on charges of sexual assault and break, enter and commit sexual assault allowed and new trial ordered

**R. v. Blyth, [1999] O.J. No. 1646 (C.A.)**

Consent - Honest belief - capacity - complainant passing out from drinking and awakening to find appellant having intercourse with her - Court of Appeal upholding conviction - trial judge implicitly finding that complainant incapable of consenting and appellant aware of this - trial judge also properly concluding that appellant not having honest belief in consent and was reckless regarding existence of consent

**R. v. AKI, [2002] O.J. No. 432 & 201 (C.A.)**

Opinion evidence - Effect of drug - expert describing effects of drug used by appellant to render complainant unconscious - Court of Appeal finding that linking drug to sexual assault experiences, "while technically inappropriate", was merely "saying no more than a jury would naturally infer from the facts of this case" - conviction appeal dismissed

**Evidence Updates**

**1. THIRD PARTY RECORDS**

**R. v. Snipe Dec 2/03 (Ont. C.A.)**

O'Connor – "likely relevance" – Court of Appeal upholding trial judge's ruling that appellant failing to met likely relevance test for initial production of records to trial judge – although complainant having pre-existing psychiatric problems, nothing in evidence to show that they could have impacted on her credibility or reliability of her evidence – inconsistencies between complainant's initial statements and her preliminary inquiry testimony not of a nature justifying production

**R. v. Clifford Mar 5/02 (Ont CA)**

O'Connor - "joint records" - Crown appeal - respondent and complainant attending some counselling sessions together - respondent filing application for production of records of therapeutic sessions - trial judge concluding that Criminal Code provisions regarding personal information records were applicable - trial judge finding that respondent not meeting test for release of records and dismissing application - respondent convicted of sexual assault - summary conviction appeal court concluding that trial judge erring in finding that Criminal Code provisions applicable, allowing appeal and ordering new trial - Court of Appeal upholding trial judge's ruling regarding applicability of Code provisions to joint records as well as ruling that records should not be produced but dismissing Crown appeal on other grounds

**R. v. G.(W.G.), [2002] O.J. No. 1542 (QL) (C.A.).**

O'Connor - "likely relevance" - trial judge rejecting application for production of Children's Aid Society records on grounds that appellant failing to establish likely relevance - Court of Appeal upholding trial judge's decision and dismissing appeal from conviction

**R. v. Batte June 13/00 (Ont. CA)**

O'Connor - records of complainants' counselling sessions - standard of "likely relevance" requiring something beyond indication that record containing a statement relating to a subject which would be relevant to complainant's credibility -

**2. PRIOR SEXUAL CONDUCT – SECTION 276**

**R. v. Pittman June 29/05 Ont CA**

Evidence of Complainant's virginity – complainant testifying that she was a virgin at time of sexual assault – defence counsel cross-examining complainant "about her physical state of virginity" but claiming on appeal that trial judge improperly curtailing cross-examination – majority of Court of Appeal concluding that, despite trial judge's ruling, "the defence essentially asked the questions it wanted to in cross-examination" – majority noting that s. 276 not prohibiting complainant from testifying she was a virgin and that when such testimony is given, "it may be too late to follow the procedure specified in s. 276 by giving seven days notice before adducing the evidence" – however, "the spirit and intention of the section" was still applicable in these circumstances and the collateral facts rule still applied also – in this case, "the appellant did engage in a cross-

examination broadly designed to show that the complainant was not a virgin and then used her alleged sexual history and reputation to attack her credibility"

Prior inconsistent statements – prior sexual conduct – Crown witness testifying that complainant talked about having "done five guys at one time before" – complainant denying making that statement – complainant also denying that she said she had "played guys" in order to get Fubu sneakers and a pager – trial judge instructing jury that they could "use that evidence to help you decide what really happened on May 27<sup>th</sup>, 2000 in the same way that you consider other evidence in this case" – trial judge also instructing jury that, if they found statements were evidence of prior sexual activity, jury could not use statements to support inference that complainant was more likely to have consented or to infer that complainant was less believable or reliable – trial judge refusing to tell jury that, if they found complainant's denials were false, they could consider that lie in assessing her credibility – majority of Court of Appeal finding no error – evidence of prior sexual activity could not be used like any prior inconsistent statement – jury could only use evidence of complainant's sexual activity "to rebut her physical status as a virgin", a fact which was not relevant to an issue in this case

***R. v. Powell May 10/04 (Ont. C.A.)***

Evidence that appellant and complainant slept together one night in same bed and that they kissed next morning when appellant left – Court of Appeal upholding trial judge's ruling refusing to allow proposed questioning under s. 276 – trial judge properly considering timing of request, appellant's failure to comply with notice requirements and failure to provide detailed particulars – trial judge also properly concluding that evidence having limited probative value where jury knew that appellant had slept over at complainant's residence on night in question and that he and complainant parted on friendly terms the next morning – evidence also having prejudicial effect of potentially misleading jury into thinking that appellant and complainant engaged in sexual activity on night in question

***R. v. Marcotte June 26/00 (Ont. C.A.)***

Cross-examination of complainant in sexual assault case - prior allegation of sexual assault against someone other than accused - collateral matter - appellant convicted of sexual assault and summary conviction appeal dismissed - further appeal to Court of Appeal also dismissed - appellant arguing that summary conviction appeal court erring in upholding trial judge's refusal to permit defence to cross-examine complainant about a prior sexual assault complaint which she made against a different person - Court of Appeal finding that "the proposed cross-examination of the complainant was with respect to a collateral matter" - *R. v. Riley* (1992), 11 O.R. (3d) 151 permitting cross-examination of complainant about an alleged prior false complaint only if the "defence is in a position to establish that the complainant has recanted her earlier accusations or that they are demonstrably false" - further, since proposed line of questioning relating to collateral matter, trial judge's decision to exclude cross-examination involving exercise of his discretion - summary conviction appeal court correctly finding no basis on which to interfere with trial judge's exercise of discretion

***R. v. Robertson, [2000] O.J. No. 1698 (C.A.)***

Cross-examination of complainant in child sexual abuse case - prior sexual conduct - whether complainant previously sexually abused - collateral matters - trial judge permitting defence counsel to question complainant regarding what she told police about whether act with appellant was her first act of sexual intercourse and also permitting defence to call witness to contradict complainant's denial that she had told witness that she had intercourse with her boyfriend - however, trial judge not permitting defence counsel to call evidence or cross-examine to contradict complainant on whether she in fact had intercourse with her boyfriend or was previously abused by her natural father - Court of Appeal dismissing appeal from conviction - as Crown not disputing that it was open to trial judge to permit questioning he did, Court not called upon to consider correctness of allowing questioning regarding prior sexual conduct - Court agreeing that contradicting complainant on whether she in fact had intercourse with boyfriend or was abused by her father was irrelevant to any issue except credibility and defence therefore not entitled to contradict complainant by extrinsic evidence - admission of such evidence offending collateral fact rule quite apart from s.276 of Code

***R. v. Robins, [1999] O.J. No. 1578 (C.A.).***

Prior sexual conduct - alleged false prior allegation of sexual assault - trial judge refusing to investigate contents of envelope delivered to him which may have contained information concerning a prior allegation of sexual assault by complainant - Court of Appeal upholding trial judge's decision - Court remarking it was 'unfortunate' trial did not accede to request that envelope be marked for identification

***R. v. Bunn Sept 9/98 (Ont. C.A.)***

Cross-examination of complainant in sexual offence case - other allegations of sexual abuse - complainant indicating in statements to police that people other than the appellant also sexually abusing her - defence counsel seeking to cross-examine complainant on allegations of sexual abuse by others in order to call other alleged abusers to contradict complainant - trial judge not permitting cross-examination pursuant to *Riley* (1992), 11 O.R. (3d) 151 - appellant convicted - majority of Court of Appeal upholding trial judge's decision - whether complainant sexually abused by others irrelevant to charges against appellant - matters therefore totally collateral and defence should not be permitted to contradict complainant - tactic also 'inimical' to principle underlying s. 276 although reliance on that section not ultimately necessary - trial judge properly exercising discretion to reject evidence as tactic directed at creating confusion by having jury consider not one criminal case against appellant but a number of other allegations of criminal conduct - exercise of such discretion not raising a question of law in any event

**3. DELAYED DISCLOSURE**

***R. v. Wiebe Feb 13/06 (Ont. C.A.)***

Sexual offences involving children – delay in disclosure – appellant arguing that the trial judge did not properly instruct the jury regarding the use they could make of the complainant's failure to complain about the alleged sexual assaults by the appellant until several years had passed – trial judge charging the jury based on *R. v. D.D.* [2000] 2 S.C.R. 275 – omitting the portion of the recommended instruction in *R. v. D.D.* that states, "[r]easons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge" – Court of Appeal finding that omitting a list of reasons why there might be a delay in reporting actual abuse did not prejudice the defence – Court of Appeal not giving effect to this ground of appeal

#### ***R. v. WMM Feb 7/06 (Ont CA)***

Sexual offences involving children – delay in disclosure – appellant convicted of two counts of incest involving his two half-sisters – half-sisters not complaining to the police until the fall of 2001, some 30 years after the abuse ended – trial judge instructing the jury that "a delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant" – this instruction being in accordance with *R. v. D.D.* (2000), 148 C.C.C. (3d) 41 (SCC) – appellant taking issue with the timing of the instruction – submitting that this instruction, if provided after the judge has reviewed the particular circumstances of the case, would be understood by the jury to qualify the significance of the delay and unfairly limit the relevance of the evidence, creating a rebuttable presumption that the delay in complaining is not relevant – Court of Appeal not agreeing that providing the *R. v. D.D.* instruction after having reviewed the circumstances of the case in general would have misled the jury – included in the judge's *R. v. D.D.* instruction was a specific direction that the timing of the complaints was a circumstance to consider – Neither was this a case such as *R. v. Crampton*, (2004) 188 O.A.C. 357, where a new trial was required as a result of deficiencies in the trial judge's jury instructions, one of which being a failure to instruct the jury that it was required to consider whether the delay in disclosure was the result of fabrication – in *Crampton* the allegation of fabrication went hand-in-hand with the defence theory of consent – in this case the defence did not advance a specific motive for fabrication – Court of Appeal finding no error in the trial judge's instruction

#### **4. EXPERT EVIDENCE**

##### ***R. v. Thomas Hackett Apr 10 /06 (Ontario Court of Appeal)***

Psychiatric evidence in a sexual offence case - appellant convicted of offences arising from sexual abuse - complainants coming forward with allegations many years after the offences occurred - defence position being that the complainants' evidence was the result of "acquired or false memories" created during counselling sessions - calling as a defence expert a psychiatrist with particular expertise in memory - trial judge concluding that false memory syndrome is not a particular area of psychiatric expertise but rather is "part and parcel" of psychiatry - ruling that the defence expert was qualified as an expert psychiatrist and physician - expert testifying that there was a high probability the evidence of the complainants, as contained in the transcript of their preliminary inquiry testimony and videotapes to the police, reflected acquired or false memories - trial judge considering defence expert's testimony but finding the expert's opinion concerning the reliability of the complainants

suffered from a defence bias - Court of Appeal not accepting the appellant's argument that the trial judge erred in refusing to qualify psychiatrist to give expert evidence in the area of recovered or acquired memories - the trial judge did not refuse to qualify the expert in that regard - rather, she saw the area as being "part and parcel" of the field of psychiatry - she accepted that the defence expert was qualified to give psychiatric evidence, including evidence of false memory syndrome - Court of Appeal also noting that the appellant, having tendered the evidence without objection at trial, cannot reverse that decision on appeal because the expert's evidence did not have the desired effect

***R. v. Liu Oct 19/04 (Ont. C.A.)***

Expert Opinion evidence of Sexual assault related injuries – physician, liaison to Sexual Assault Treatment Centre, testifying that injuries to deceased's genitalia were indicative of non-consensual sex – Court of Appeal concluding that evidence was properly admitted – doctor's evidence was not novel as appellant contended but "was based on her extensive practical experience supplemented by the admittedly limited academic literature" – doctor was qualified to give evidence she gave and opinion she expressed did not go beyond her expertise – jurors could not be expected to have expertise concerning injuries to the vagina so evidence was necessary and "would rebut the anticipated evidence of the appellant that he had consensual intercourse with the deceased and was not angry with her that evening"

***R. v. F.P. July 4/05 Ont CA***

Expert Opinion evidence of Sexual assault related injuries – vaginal trauma consistent with penile penetration – one count (count 13) against appellant charging him with sexually assaulting A. by putting his penis on or in her vagina – A. testifying about the difference between appellant putting his penis on her vagina and in her vagina but indicating that she was not sure that he had ever put his penis in her vagina – no count in indictment alleging that appellant had put his penis in V.'s vagina and V. did not give evidence that he had done so – trial judge permitting Crown to lead evidence from two doctors that both complainants had experienced vaginal trauma consistent with penile penetration – appellant arguing that evidence was improperly admitted since it was irrelevant or that what little probative value it had was outweighed by its prejudice – Court of Appeal characterizing evidence of one doctor as "neutral", as he testified that, while penetration was a possible cause of the trauma he observed, there were many possible causes and penetration was a very uncommon cause – this evidence, even if irrelevant, was not prejudicial to appellant – second doctor's evidence was relevant to count 13 and A.'s testimony provided an evidentiary foundation for the opinion but the opinion evidence of the second doctor was irrelevant to any of counts in the indictment concerning V. – while trial judge erred in admitting evidence, at least in relation to V., curative proviso was applicable – evidence was not overly technical or confusing and would not have overwhelmed jury – trial judge properly directed jury not to place undue weight on medical evidence – as well, jury would have understood that it could not use medical evidence concerning A. to buttress charges relating to V. – defence counsel at trial did not object to admission of evidence or to charge concerning it – Court of Appeal concluding that "the appellant's contention does a disservice to the common sense of the jury"

***R. v. Quashie June 29/05 ont ca***

Sexual assault-related injuries – *Liu* (2004), 190 C.C.C.(3d) 233 – appellant charged with two counts of aggravated sexual assault – at trial, Dr. Parker, consulting physician to Sexual Assault Treatment Centre, testifying that injuries to complainant's genitalia were consistent with non-consensual sex – jury convicting appellant of one count of sexual assault and one count of sexual assault causing bodily harm – Court of Appeal concluding that decision in *Liu* was "a complete answer" to appellant's submissions regarding admissibility of Dr. Parker's evidence – Dr. Parker not giving opinion on whether or not complainant consented but gave evidence on whether complainant's injuries were consistent with non-consensual sex – Dr. Parker was qualified to testify about effects of different stress factors on structures of genitalia – Court of Appeal also rejecting submission that evidence was "novel" – absence of studies comparing injuries resulting from first-time consensual intercourse with injuries arising from first-time non-consensual intercourse going to weight of opinion evidence but not affecting admissibility – Dr. Parker's evidence not usurping jury's function in deciding issue of consent – Court of Appeal also concluding that trial judge's instruction concerning expert evidence "provided sufficient assistance to the jury as to how to deal with the conflicting expert evidence"

***Perera June 22/05 ont ca***

Psychiatric evidence – sexual sadism – Crown's expert, called to rebut defence experts' opinions regarding not criminally responsible defence, testifying that appellant indicated signs of sexual sadism – Court of Appeal concluding that evidence properly admitted – evidence forming part of diagnosis and jury was entitled to have complete picture in assessing appellant's mental condition regarding NCR issues – trial judge not erring by failing to tell jury that evidence of sexual sadism was relevant only to NCR issues but should not be considered in relation to whether appellant had intent for murder – in light of "very peculiar manner in which the deceased had met her death, and the sexual assault element to the first-degree murder charge", Crown was entitled to lead evidence of sexual sadism and appellant's psychiatric disposition in that regard – trial judge also giving limiting instruction regarding this evidence

***R. v. Liu Oct 19/04 Ont CA***

Evidence – Opinion evidence – Sexual assault related injuries – physician, liaison to Sexual Assault Treatment Centre, testifying that injuries to deceased's genitalia were indicative of non-consensual sex – Court of Appeal concluding that evidence was properly admitted – doctor's evidence was not novel as appellant contended but "was based on her extensive practical experience supplemented by the admittedly limited academic literature" – doctor was qualified to give evidence she gave and opinion she expressed did not go beyond her expertise – jurors could not be expected to have expertise concerning injuries to the vagina so evidence was necessary and "would rebut the anticipated evidence of the appellant that he had consensual intercourse with the deceased and was not angry with her that evening"

***R. v. T.C. Oct 7/04 Ont CA***

Evidence – Opinion evidence – psychologist – techniques for interviewing children – admissibility – necessity – defence seeking to introduce expert evidence concerning techniques of interviewing children to attack reliability of statements obtained from complainants – trial judge

concluding that evidence did not meet necessity element of *Mohan* (1994), 89 C.C.C.(3d) 403 (S.C.C.) and refusing to admit expert testimony – Court of Appeal upholding trial judge's ruling – trial was by judge alone – most of the proposed evidence “concerned matters that were self-evident, such as the effect of leading questions, refreshing a witness's memory, the need for the child to understand the duty to tell the truth and failing to explore inconsistencies” – Court of Appeal noting that this was “the stock and trade of what trial judges do day in and day out” – most of proposed evidence of no additional assistance to trial judge – even if trial judge erring in excluding evidence, no prejudice to appellant

***R. v. AKI Feb 8/02 Ont CA***

Expert evidence re Effect of drug - expert describing effects of drug used by appellant to render complainant unconscious - Court of Appeal finding that linking drug to sexual assault experiences, “while technically inappropriate”; was merely “saying no more than a jury would naturally infer from the facts of this case” - conviction appeal dismissed

***R. v. Markman nov 5/02 Ont CA***

Expert psychiatric evidence in a sexual offence case - false memory syndrome - Court of Appeal concluding that trial judge properly giving little, if any, weight to defence expert evidence in this case - evidence resting “on the shakiest of evidentiary foundations” - Court of Appeal also concluding that trial judge properly refusing to order disclosure of all of the treatment records of complainant's doctor, who was called as a Crown witness in reply

***R. v. Colas Nov 21/01 Ont CA***

Expert evidence of medical opinion that complainant's injuries consistent with forcible intercourse - Court of Appeal finding that witness's experience as a physician at Sexual Assault Treatment Centre qualifying her to give evidence she gave - Court also finding no error in trial judge's treatment of evidence in charge to jury

***R. v. O'Dell dec 6/01 ont ca***

Evidence - Opinion evidence - Recovered memory in sexual abuse case - Court of Appeal concluding that trial judge not placing undue weight on expert evidence in finding that complainant's evidence credible and reliable despite inconsistencies - Court also concluding that trial judge not improperly using expert evidence to corroborate complainant's evidence

***R. v. Aminian, [1999] O.J. No. 4240 (C.A.).***

Medical evidence in sexual abuse case - witness qualified to give opinion evidence regarding injuries to genital tract and testifying that complainant's injury consistent with forced penetration and inconsistent with consensual sex - witness, who did not have expertise in assessing developmentally delayed persons, also testifying that complainant, who was mentally disabled, did not have capacity to understand mechanics of sexual intercourse or to understand what the vagina was - Court of Appeal finding no error in admission of expert evidence - deficiencies in her expertise going to weight not admissibility of evidence

***R. v. Washington, [1999] O.J. No. 3933 (C.A.).***

Evidence - Opinion evidence - child sexual abuse case - expert in pediatrics with experience in examining and diagnosing child sexual abuse testifying that there was an extremely high probability that complainant had been sexually abused - Court of Appeal concluding that evidence properly admitted - reliance by expert on complainant's evidence at preliminary proper as providing foundation for opinion - trial judge properly instructing jury on point - expert's evidence found not to be improper bolstering of complainant's credibility

***R. v. Liu Oct 19/04 Ont. C.A.***

Sexual assault related injuries – physician, liaison to Sexual Assault Treatment Centre, testifying that injuries to deceased's genitalia were indicative of non-consensual sex – Court of Appeal concluding that evidence was properly admitted – doctor's evidence was not novel as appellant contended but "was based on her extensive practical experience supplemented by the admittedly limited academic literature" – doctor was qualified to give evidence she gave and opinion she expressed did not go beyond her expertise – jurors could not be expected to have expertise concerning injuries to the vagina so evidence was necessary and "would rebut the anticipated evidence of the appellant that he had consensual intercourse with the deceased and was not angry with her that evening"

**5. HEARSAY**

***R. v. Khelawon (14 December 2006) S.C.C.***

Evidence - Hearsay - Principled approach - admissibility of out-of-court statements for truth of their contents - Reliability - *F.J.U.* (1995), 101 C.C.C.(3d) 97 (S.C.C.) - *Starr* (2000), 147 C.C.C.(3d) 449 (S.C.C.) - respondent charged with a number of assaults against five elderly residents of retirement home - complainants unable to testify - trial judge allowing out-of-court statements of complainants to be admitted for the truth of their contents - trial judge relying on "strikingly similar" exception set out in *F.J.U.* and finding that, taken globally, complainant's statements were sufficiently similar so that threshold reliability was satisfied for each statement - trial judge convicting appellant of offences in relation to two

complainants and acquitting of all offences in relation to other three complainants - majority of Court of Appeal finding that trial judge erring in admitting statements on basis of *F.J.U.* exception and acquitting respondent - Crown appeal to Supreme Court of Canada dismissed - Supreme Court concluding that factors to be considered in determining whether hearsay statement should be admitted not to be categorized in terms of threshold and ultimate reliability - Court holding that "all relevant factors should be considered including, in appropriate cases, the presence of supporting or contradictory evidence" - approach requiring case-by-case analysis where "the scope of the inquiry must be tailored to the particular dangers presented by the evidence and limited to determining the evidentiary question of admissibility"

### ***R. v. C.(R.) Aug 3/05 Ont CA***

Evidence – Hearsay – Principled approach – Out-of-court statement for truth of its contents – statement of child in sexual assault case – *Khan* (1990), 59 C.C.C.(3d) 92 (S.C.C.) – necessity – multiple statements – appellant convicted of two counts of sexual interference regarding his niece, A.C., and a family friend, who were six and seven years old respectively at time of trial - offences alleged to have occurred more than two years prior to trial – trial judge admitting four out-of-court statements made by appellant's niece and one made by family friend – appellant abandoning conviction appeal of offence involving family friend but arguing that conviction for offence against niece should be set aside because trial judge erred in admitting out-of-court statements – Court of Appeal allowing appeal from conviction for offence involving niece and ordering new trial – while out-of-court statements were inconsistent with niece's testimony, niece did not recant prior statements – Court rejecting submission that trial judge required to apply criteria used for recanting witness set out in *K.G.B.* (1993), 79 C.C.C.(3d) 257 (S.C.C.) - Court also rejecting appellant's submission that statements did not meet necessity criteria – although both complainants testified at appellant's trial, out-of-court statements still necessary in order to obtain accurate and frank rendition of child's version of relevant events – out-of-court statements containing additional details not contained in niece's *viva voce* evidence – objective of obtaining accurate and frank rendition "best achieved by adding to the evidence before the jury the additional facts contained in the out-of-court statements, even if those facts are inconsistent with parts of the child's *viva voce* evidence" – Court concluding however that trial judge erring in admitting all four of niece's out-of-court statement – each statement essentially repeating the same facts – once one of the statements was admitted, "it was no longer reasonably necessary to admit the others to get a full and frank version of A.C.'s recollection"

### ***R. v. Moonias Dec 13/04 Ont CA***

Admissibility of out-of-court statement for truth of its contents – Principled exception – Necessity – Reliability - appellant charged with sexual assault – complainant beginning to testify at trial but breaking down on witness stand and unable to continue, resulting in adjournment – when trial recommencing, complainant refusing to enter courtroom to testify due to her fear of appellant – despite efforts to accommodate complainant, she would not re-enter courtroom while appellant present – closed circuit video not available in courtroom – Crown taking position that complainant was unable to testify and seeking to admit videotaped statement given by complainant to police about three months after alleged offence – trial judge finding statement to be necessary and reliable and admitting it – appellant convicted – Court of Appeal upholding ruling finding that statement was necessary but concluding that trial judge erring in finding that statement was reliable – appeal allowed and acquittal entered

***R. v. Nicholas (2004), 182 C.C.C. (3d) 393 (Ont. C.A.); appn for leave to appeal dismissed [2004] S.C.C.A. No. 225 (QL)***

Evidence – Hearsay – Principled exception – K.G.B. – out-of-court statements – 911 call – *res gestae* – Crown appeal - victim of August 21 offences making 911 call about ten minutes after intruder fleeing and also providing unsworn videotaped statement to police – complainant unable to testify at appellant's trial due to post-traumatic stress disorder - trial judge ruling that videotaped statement was both necessary and reliable and that 911 call could be categorized as *res gestae* – trial judge however exercising residual discretion and refusing to admit the statement and the 911 call on basis that respondent's right to make full answer and defence would be violated due to inability to cross-examine complainant – trial judge acquitting respondent of August 21 offences – appeal by Crown allowed and new trial ordered – trial judge's decision to refuse to admit evidence "based on an erroneous principle, namely, that he was obliged to defer to defence counsel assertions about the utility of cross-examining [the complainant] in spite of his own serious misgivings about its value" – evidence was not relevant to issues of identity and consent, as argued by defence counsel – complainant unable to identify attacker since he held a pillow over her face – Crown relying on DNA evidence for identification – issue of consent or mistaken belief in consent could not arise on facts in this case – in absence of evidence indicating how admission of evidence would actually prejudice respondent and trial process, no basis to exclude it where evidence found to be necessary and reliable

***R. v. Michaud May 21/04 Ont CA***

Hearsay – Exceptions – Spontaneous declaration – *res gestae* – *Starr* (2000), 147 C.C.C. (3d) 499 (S.C.C.) – statement to emergency department physician – Court of Appeal upholding admissibility of statement made by complainant to doctor at hospital emergency – statement admissible under spontaneous declaration exception and appellant not discharging burden of showing that it was inadmissible despite falling within a traditional exception to the hearsay rule – Court concluding that requirements of necessity and reliability were satisfied in any event

Hearsay – Exception – K.G.B. - complainant's statement to police – reliability – Court of Appeal upholding trial judge's ruling admitting complainant's out-of-court statement to police – although statement not made under oath, police providing extensive warning to complainant prior to her making statement – Court concluding that "the warning was sufficient to bring home to the victim the gravity of the situation and her duty to tell the truth" – complainant was available to be cross-examined at trial, at least regarding possible motives to falsely implicate appellant and limitations on cross-examination "resulting from the victim's stated inability to recall could be considered in assessing the ultimate weight to be given to the statement" – Court also noting a number of other factors supporting threshold reliability of statement, including short period between offence and making of statement, absence of coercion to provide statement, fact that complainant did not repudiate her statement and "contextual corroborating evidence supporting reliability not mattering where other factors demonstrating reliability were "overwhelming" – appeal from conviction dismissed

## PROCEDURAL DEVELOPMENTS

### Section 161 Orders

#### **R. v. Souetov, [2006] O.J. No. 4873 (C.A.).**

Sentence - Obscenity - Child pornography - Distribution - section 161 prohibition order - appellant pleading guilty to one count of distributing child pornography - trial judge imposing sentence of 90 days imprisonment to be served intermittently, three years probation and a ten year s. 161 order - Court of Appeal upholding ten year s. 161 order but varying it to permit appellant to attend proscribed public places in company of an adult - ten year order not unreasonable in light of serious nature of offence

#### **R. v. W.Q. Ont CA June 22, 2006**

Sentence - Section 161 of the *Criminal Code* - despite not being prepared to find that the appellant is a pedophile, the sentencing judge making an order pursuant to s. 161 of the *Code* prohibiting the appellant for life from attending a public park, public swimming area, or community centre - Court of Appeal not giving effect to this ground of appeal - s. 161 requires a sentencing court to consider and permits it to impose and later vary the conditions of an order of prohibition upon conviction - the section is discretionary - the trial judge did not find the accused to be a pedophile and appreciated that to a certain extent, his offence was committed in circumstances found to be situational - nevertheless she found that a prohibition was required - it was a matter for her discretion and absent error in principle, and there was none demonstrated, Court of Appeal not prepared to interfere - appeal dismissed

#### **R. v. Willard Dec 15/04 Ont CA**

Sentence - Obscenity - Child pornography - Possession - Distribution - Accessing - detective in New Hampshire posing as a 14 year old boy and posting his profile on a chat room frequented by adults interested in sex with children - appellant, 58 years old, posing as a 34-year-old man and exchanging lurid emails with detective - Toronto police arresting appellant and finding a large collection of child pornography in his home - appellant having a criminal record involving sexual offences spanning three decades - pre-sentence report indicating that appellant a high risk to re-offend - appellant spending a year in pre-trial custody - appellant pleading guilty - sentencing judge giving appellant two years credit for pre-trial custody and imposing further sentence of 10 months imprisonment and three years probation with condition that appellant not associate or hold private communications with any one under 17 unless in company or presence of an adult family member of person - sentencing judge also making lifetime s. 161 order - Court of Appeal dismissing appeal from sentence - appellant having a lengthy criminal record and not showing any intention of obtaining treatment - specific deterrence and denunciation important goals in this case - conditions in probation order were reasonable in circumstances

## SEX OFFENDER REGISTRY

**R. v. Dyck (2005), 203 C.C.C. (3d) 365 (Ont. S.C.J.).**

Ontario statute requiring sexual offenders to register with police not contrary to principles of fundamental justice. Registration requirement not form of punishment. Statute did not concern property and civil rights or local matters, however, statute did concern administration of justice and not criminal law. Statute *intra vires* province. Doctrine of paramountcy did not render statute inoperative.

## VIDEO – 715.1

**R. v. Archer Oct 13/05 Ont. C.A.**

Witness – Child – Videotape evidence – s. 715.1 – admissibility – whether videotaped statement “made within a reasonable time after the alleged offence” - whether jury should have been given videotape for use during deliberations – complainant providing videotaped statement immediately after going to police in February, 1998 and within about three weeks of date on which complainant said last act of sexual abuse occurred – Court of Appeal concluding that videotape made within reasonable time after alleged offence – Court holding that where “the alleged offence involves ongoing sexual abuse over a prolonged period of time, the operative date must be the last incident of abuse” – even though abuse beginning in 1993, complainant’s statement in 1998, made three weeks after last act of abuse, coming within reasonable time requirement

**R. v. P. S., [2000] O.J. No. 1374 (C.A.)**

Witness - Child - Videotape evidence - whether videotape “made within a reasonable time after the alleged offence” - C. making videotaped statement on February 17, 1996 and reporting that appellant had sexually assaulted her on one occasion - assaulting occurring about two years prior to making of videotape - trial judge finding that videotape made within reasonable time after alleged offence - Court of Appeal upholding ruling - Court noting that trial judge’s reasons for finding videotape made with reasonable time “not helpful” - trial judge essentially finding that delay not unreasonable because C. was a young child and children often delay reporting sexual assault - Court of Appeal concluding however that there was ample evidence on the record, although not referred to by trial judge, to explain delay - also nothing to suggest that anything occurring in two year period to influence C. or to suggest C. having a motive to fabricate - appeal from conviction for sexually assaulting C. also dismissed